NO. 47903-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

IN RE THE WELFARE OF J.B.

MINOR CHILD

ON REVIEW FROM
THE SUPERIOR COURT FOR KITSAP COUNTY
STATE OF WASHINGTON

The Honorable Jennifer Forbes, Judge

MOTION FOR ACCELERATED REVIEW
BRIEF OF FATHER J.B.

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RULES, STATUTES AND OTHERS

A. ASSIGNMENT OF ERROR

1. The trial court erred in entering finding of fact VII that the state proved that continuation of the parent child relationship diminished J.B.'s prospects for early integration into a permanent and stable home.

2. The trial court erred in entering finding of fact VIII that termination was in J.B.'s best interests.

3. The trial court erred in entering conclusion of law II, that termination was in J.B.'s best interests.

4. The trial court erred in entering conclusion of law III, that the Department proved all of the criteria in RCW 13.34.180(1)(f) that continuation of the parent child relationship diminished J.B.'s prospects for early integration into a permanent and stable home.

5. The trial court erred in entering conclusion of law IV that termination is in J.B.'s best interests.

6. The trial court erred in entering finding of fact on guardianship finding of fact IV.

7. The trial court erred in entering conclusion of law on guardianship II, that the Department proved the criteria under RCW

13.46.040(c)(i-v).

8. The trial court erred in entering conclusion of law on guardianship III, that guardianship is not in J.B.'s best interests.

9. The trial court violated the separation of powers doctrine by investigating the proposed guardians sua sponte.

10. The trial court violated the appearance of fairness doctrine by her aggressive cross-examination of the grandmother and her scathing findings of fact which contained the trial court's personal opinions.

11. The father was denied his due process right to a fair trial by the trial judge's investigation, aggressive behavior, and personalized findings of fact.

Issue Presented on Appeal

1. Did the trial court err in entering finding of fact VII that the state proved that continuation of the parent child relationship diminished J.B.'s prospects for early integration into a permanent and stable home, when there was no evidence that J.B.'s placement would have changed with continuation of the parent-child relationship?

2. Did the trial court err in entering finding of fact VIII that termination was in J.B.'s best interests, when the evidence supported a guardianship?

3. Did the trial court err in entering conclusion of law II, that termination was in J.B.'s best interests when the evidence supported a guardianship?

4. Did the trial court err in entering conclusion of law III, that the Department proved all of the criteria in RCW 13.34.180(1)(f) that continuation of the parent child relationship diminished J.B.'s prospects for early integration into a permanent and stable home, when there was no evidence at all to support this conclusion?

5. Did the trial court err in entering conclusion of law IV that termination is in J.B.'s best interests?

6. Did the trial court erred in entering finding of fact on guardianship finding of fact IV?

7. Did the trial court err in entering conclusion of law on guardianship II, that the Department proved the criteria under RCW 13.46.040(c)(i-v)?

8. Did the trial court erred in entering conclusion of law on guardianship III, that guardianship is not in J.B.'s best interests?

9. Did the trial court violate the separation of powers doctrine by *sua sponte* investigating the proposed guardian's JIS history?

10. Did the trial court violate the father's due process right to a fair hearing by the judge's aggressive cross-examination of the grandmother and her scathing findings of fact which contained the trial court's personal opinions?

11. Did trial violate the appearance of fairness doctrine?

12. Was the father denied his due process right to a fair trial by the trial court's behavior?

B. STATEMENT OF THE CASE

a. Summary

J.B. was removed from his parents care when his mother was caught shoplifting with ten month old J.B. J.B. was healthy, well-fed, well-groomed and happy when removed from his mother. J.B. lived with his parents and grandparents since birth. When the grandfather A.B., learned that J.B. had been removed, he was concerned for J.B. and wanted his son

and son's wife to get help for their drug use. A.B. attended a staffing with LICWAC and informed the Department that his son and son's wife used drugs.

J.B. was temporarily placed with a maternal aunt who provided J.B. with visits with his parental family which included A.B., S.B., the grandmother, her four children and a grandchild. J.B. called A.B. Papa, and S.B., Nana. When A.B. learned that J.B. was removed from his aunt's care and placed into foster care, he and S.B. requested to be a guardianship placement for J.B. The Department informed A.B. and S.B. that regardless of the paperwork provided for a home study and criminal background checks, they would never be approved as a placement for J.B. because S.B. had a prior history with CPS and a minimal criminal background.

A.B. and S.B. continued to provide the Department with paperwork and asked for a Department waiver because although S.B.'s children were removed and became dependent, when S.B. completed all services requested, the dependencies were dismissed and her 4 children have lived were her since, in good health, without any intervention from the Department since 2011. Additionally, Mason County approved S.B. and A.B. as a placement for their 2 year old granddaughter.

Apparently, the Department and the trial judge did not like the grandparents. The trial judge engaged in a very lengthy and aggressive cross examination of S.B., and wrote findings that revealed her personal opinions. The Department wanted J.B. to be adopted by the foster family he lived with for the past year because "that there would be a safer, stable placement."[sic] RP 224. Ms. Sinnitt, the social worker admitted that she could not guarantee J.B.'s safety in foster care. RP 252. And the GAL could not guarantee that J.B. would not suffer if adopted. RP 305.

b. Facts

The Department petitioned for termination of parental rights to J.B. CP 1-4. The father and mother filed a petition for guardianship with A.B. and S.B. as proposed guardians. CP 54-63, 345-346. Infant J.B. lived with his parents and his grandparents' until he was ten months old. RP 41,367. He was a happy, healthy child when he was placed in foster care after his mother was caught shoplifting with him. RP 271, 278-79, 313-14. J.B. was placed with a maternal aunt where A.B. and his family, their four children and one grandchild were able to visit with J.B. RP 314, 319. A.B. and S.B. learned that J.B. had been removed by CPS from another son who was not permitted to pick up J.B. after his mother was arrested. RP 313.

A.B. and S.B. attended the Department staffing's with LICWAC (Local Indian Child Welfare Advisory Committee). RP 313. A.B. was concerned for J.B.'s welfare and wanted his son and his son's wife to get help, so he informed the Department that his son and daughter-in-law were actively using drugs and/or alcohol. RP 314. When A.B. learned that J.B. was removed from the aunt and placed in foster care, he, S.B. and J.B.'s parents requested that he be a guardianship placement for J.B. RP 5 (June 8, 2015); RP 316.

The Department staffing's were held with a LICWAC team because the family was Native American, but ultimately, the multiple Tribe's contacted through A.B.'s and the grandmother's Indian ancestry, determined that J.B. was not enrollable and therefore not an Indian as defined under the Indian Child Welfare Act. RP 142, 143,192, 371; Exhibit 4. (Supp. CP___The LICWAC supported the Bonds as a placement for J.B. RP 317-318, 371.

The Department refused to give S.B. a waiver for a placement because S.B.'s children had been in dependencies in 2009 and 2011. RP 136, 239, 260, 264, 456. The Department had all of S.B.'s background information including her CPS history, her criminal background and her

successful completion of all of the services ordered by the court in her dependencies. RP 136, 447, 449. S.B. completed a psychological evaluation with a parenting component, mental health counseling, a drug and alcohol assessment, hundreds of clean UA's, a year-long domestic violence group and anger management. RP 449-451.

The dependencies were dismissed for all four of S.B.'s children because S.B. completed all services to the Department's satisfaction. RP 386-88. S.B.'s four children have thrived in their mother's and A.B.'s care since their return home. The children participate in extracurricular activities such as gymnastics, basketball, play outside in the sand box, and tutoring, and are excellent students. S.B. takes her children to regular doctor and dentist appointments, including well-child appointments and would do the same for J.B. RP 417-19. All of the children are healthy. Id.

There have been no issues between A.B.'s son. M.V. who was deemed a sexually aggressive youth (SAY) and her daughters, M.V.'s sisters. RP 326-328, 375-379. M.V. is not a sex offender and there are no restrictions on his living with his sisters. RP 332-33, 386,411. A.B. did not know the details of M.V. being labeled SAY other than he heard that M.V. pulled down his sister's pant when M.V. and his sister D.V. were in their

father's home, not A.B.'s home. RP 356.

A.B. has a 5 bedroom, 2 bath home and a travel trailer outside where M.V. now sleeps. RP 399, 411. All of children know and love J.B. and J.B. knows his cousins, Nana and Papa 319, 328, 411. J.B. knows his parents and goes to them freely during visits. RP 175-76.

The Department provided S.B. with a CD copy of her entire history with the Department which included her dependencies and her criminal background, yet the Department insisted throughout the dependency that S.B. needed to provide this information to them as part of the guardianship petition, in addition to a personal statement explaining her past. RP 447, 476. S.B. did not provide the personal statement for two reasons. First, the Department had all of the information including S.B.'s successful completion of all services and dismissal of the dependencies. Second, the Department, through social worker Sinnitt and Petters informed S.B. that she would never be approved as a guardianship placement for J.B. RP 269, 475-76; Ex. 34.

Aside from S.B.'s background, the Department was concerned that S.B.'s home was too messy to be safe for J.B. RP 162, 171, 173. After an unannounced home visit from the GAL, Ms. Sinnitt and Ms. Phillips, an

intern with the Department, the GAL and Ms. Sinnitt called the Mason County Sheriff for a welfare check. RP 84. At approximately 5:00PM the Department reported that the house had a horrible odor of animal urine, the laundry was piled unsafely high in the laundry room, there were no mattresses to sleep on, there were dirty diapers on the floor, garbage strewn about, and there was a huge pile of rotting garbage in garbage bags outside the home. RP 199-201, 233, 306.

Mason County Deputy Chris Mondry arrived at the S.B./A.B. home within an hour of Ms. Sinnitt's visit and request for a welfare check complaining that the home smelled, was dirty and there were no mattresses. RP 84-88, 91. Neither Ms. Sinnitt nor the GAL alerted the family that they were calling the sheriff. RP 272-74. When Officer Mondry arrived, he inspected the entire home and found the house to be free of odors; there were mattresses to sleep on; the house was not very messy, there were no safety risks to the children; and officer Mondry stated that he would not have any trouble allowing his own children to live in the home. RP 94.

The Bremerton office of the Department of Child Services for Mason county provided A.B. and S.B. with a letter following a visit the night

before December 8, 2014, the day, Ms. Sinnitt and the GAL visited which indicated as follows: "Upon walking through the home, I found the home to be clean and free of any immediate visual safety hazards.". RP 229, 293, 332-34; Ex. 31. The letter indicated that the garbage bags outside the home did not pose a safety hazard. RP 234.

A.B. and S.B. have been together for eight years and married for 5 years. RP 374. During their marriage they took two months of separate time for A..B. to work on his personal issues which impacted the marriage. RP 331, 374. A.B. went to counseling during these two months and obtained the help he needed. Id. Both A.B. and S.B. testified that there was never any domestic violence in their relationship. RP 343, 375. S.B. informed the court that she obtained a temporary anti-harassment order against A.B. at A.B.'s request so that the two could take a complete break during their two month separation. RP 374. S.B. admitted that she was not entirely truthful to the court when she asked for the anti-harassment order because she was informed that to obtain an order she needed to write something sufficient for the court to issue the order. RP 473-74.

The trial court in this case informed the parties that she was going

to review the Judicial Information Sheet for A.B. and S.B. on her own initiative and claimed authority to do this investigation citing to H.B. 1617[1], which did not become effective until July 24, 2015, a little more than six weeks after the fact finding hearing. RP 431-32. Using information for the JIS, the trial court engaged in aggressive cross examination of S.B. RP 471-486.

During her cross examination of S.B., the trial court accused S.B. of not believing that her daughters were touched inappropriately by their brother M.V. who was labeled a sexually aggressive youth based on alleged acts that occurred outside the grandparents' home. RP 471-86. The trial court accused A.B. of not knowing the meaning of a SAY, but the evidence revealed that A.B. did not know the details of an incident where M.V allegedly pulled down his sister's pants while in his father's home. RP 356. A.B. testified that M.V. was not a registered sex offender and there were no restrictions on his living with his sisters or with anyone else. RP 332.

The trial court tried to get S.B. to contradict A.B., she attacked S.B. for providing paperwork to the Department for a

[1] RCW 2.28.210. Effective July 24, 2015.

Guardianship when Ms. Sinnitt and Ms. Petters informed S.B. that her efforts were futile. RP 474-76. The trial court questioned S.B. about her prior DV and anti-harassment order. RP 473-474, 482-83. S.B.'s prior DV's from 1997 and 2006 were dismissed by way of pretrial diversion. RP 483-84.

The trial court attacked S.B. accusing her of not believing her daughter's when they informed their foster mother that M.V. had touched them, but never told their counselor's or mother and the foster mother wanted to adopt the girls. RP 477-78. The Department never put any restrictions on M.V. RP 477. The trial court challenged S.B. on the functionality of a hall alarm in the house and questioned why S.B. did not take a video of her home when Ms. Sinnitt and the GAL were in her home. 478-81.

The trial court in her findings discounted the fact that 5 children lived safely, in comfort, and without apparent needs for their health, welfare and safety by finding that the fact that these children were not removed from the grandparents, did not mean that the home was safe and stable for children. CP 93-99.

The trial court found that S.B. blamed everyone else for past

family issues. Id. S.B. freely admitted that her children were all removed from her care and made dependents of the state until she successfully completed drug and alcohol assessment, domestic violence and anger management treatment, provided hundreds of clean UA's ,took parenting classes, and satisfied the trial courts in 2009 and 2011 that she could safely parent her children. RP 386-88. The dependencies were dismissed and the children appear to be thriving. RP 417-19.

While acknowledging that no parents are perfect, the trial court relied on the social worker and not the Mason County Sheriff about the mess in the house, which led her to speculate that she was not convinced the other children were being well cared for. CP 93-99.

The court did find that although the grandparents are family that this was sufficient to establish that the grandparents have the skills necessary to care for J.B. or that they have a home that is appropriate for J.B. CP 93-99. The termination Findings of Fact VII, and VIII provide:

VII

Continuance of the parent-child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home. The Department can prove this element in one of two ways. *In re Welfare of R.H.* 176 Wn. A pp. 419, 428, 309 P.3d 620 (201 3).

First, the Department can prove that prospects for a permanent home exist but the parent-child relationship prevents the child from obtaining that placement. Second, the Department can prove the parent-child relationship has a damaging and destabilizing effect on the child that would negatively impact the child 's integration into any permanent and stable placement.

A guardianship is material under *R.H* as to whether the Department has established this element. The parents have filed a guardianship petition under RCW 13.36, 15-7-00195-7, naming ART BOND and SAMANTHA BOND as proposed guardians, and the court has reviewed RCW 13.36 and the case law on this statute.

ART BOND and SAMANTHA BON D were not credible and their lack of credibility was stunning to the court. They refused to state the truth and did not take responsibility for anything. Instead, they minimized, denied, and avoided the truth. Both were not credible regarding the 2014 Domestic Violence incident. Both were lying to a court at one time – either they conspired together to the court that issued the domestic violence or they lied to this court in their testimony.

They com mitted perjury to one of the courts. SAMANTHA BOND was a moving target

throughout the case and not credible. According to SAMANTHA BOND, everyone else was to blame for past family issues. The court would have found it more credible to she had admitted that she had previous issues.
She was the subject of two different dependency matters, but she has not acknowledgment that there was anything to be corrected. Instead, she blames others for the dependency actions. Her child Michael is a sexually aggressive youth, but ART BOND does not know what that means.

SAMANTH A BOND did not see that anything was correctable as to Michael. Children already being in the Bond home is not the standard. Removing children from a home versus establishing a guardianship is not the same thing. No parent or custodian is perfect, but the home must be safe and stable for children. The court does find that the Bonds are family and that they love JESSE BOND JR. Family is important. But, the court is not convinced that the Bonds have the skills necessary to care for the child or that they have a home that is appropriate for the child. Their home is already in disarray and chaos. The court is not convinced that the other children are in fact, being well cared for by the Bonds. The Bonds' statements are not persuasive, given their credibility issues. Photos of the family home were staged. The Bonds did not cooperate with CPS and the other children are not allowed to speak to CPS.

The Bonds maintained that another toddler was placed in their home, which would have been positive. However, the child was not placed with the Bonds. The child was left with the Bonds by that child's parents. There is nothing in the

record to establish that that child was placed with them. The Mason County action on that child is not dispositive as it is uncontested, with no investigation occurring, and no one advocating for that child.

A RT BON D and SAMANTHA BON D allowed the parents, J ESSE BOND and KELSEYBAKER, to live on their property while actively using drugs. The Bonds did nothing to protect this child while the parents were actively using, even though SAMANTHA BOND stated she saw the child every day. The court believes that if JESSE BOND J R. was placed with the Bonds, the parents would be back in the family home and they are continuing to actively use.

J ESSE BOND J R. would not be a priority for the BONDS. Rather, not dealing with the Department would be the priori ty for the Bonds. ART BON D and SAMANTH A BON D would put their views above everything el se and would not make the child a priority. The child, JESSE BOND J R. is a toddler and has been in foster care placements with maternal relatives and then his current placement the majority of his life. He has been in his current placement for a year, and it is safe stable and appropriate. This placement is meeting his needs and is a potential adoptive home. The Department has proven that prospects for a permanent home exist but that the parent-child relationship prevents the child from obtaining that placement. The only option for a permanent, safe and stable home for the child is by an adoption. That home will not be able to adopt J ESSE BOND J R. if the parents retain their parental rights.

VIII

> An order terminating all parental rights is in the best interests of the minor child. J ESSE BOND J.R. needs a permanent and stable home and his current placement is safe, stable and appropriate. KELSEY BA K ER and JESSE BOND have not been able to care for this child and indicated that they wanted the Bonds to care for the child. The needs of the child are being met by the current home for the child, and not by the parents.

Conclusions of Law II, II, IV provide that the Department met its burden under RCW 13.34.180 .190. The Guardianship findings and conclusions provide similarly, that the Department met its burden under RCW 13.36.040 and that Guardianship is not in J.B.'s best interests. The facts in support of the findings and conclusions on the guardianship are the same as those relied on for the termination findings and order. CP 93-99; 355-39.

The trial court denied the guardianship and terminated the father's parental rights. CP 93-101, 355-59. This timely appeal follows. CP 102.

C. ARGUMENTS

1. THE TRIAL COURT ERRED IN DENYING THE PETITION FOR GUARDIANSHIP

a. Introduction to Guardianship Statute.

The father field a petition for guardianship with his father A.B. CP 54-63. A Guardianship is a "more flexible" alternative to termination that provides stability, permanency and access to the parent's love and nurturing. *In re Welfare of R.H.*, 176 Wn.App. 419, 426-27, 309 P.3d 620 (2013); *In re the Welfare of S.V.B.,* 75 Wn.App. 762, 775, 880 P.2d 80 (1994).

In 2010, the Washington legislature created this "more flexible" alternative to termination chapter under Title 13 RCW entitled "Guardianship." Laws of 2010, chapter 272; Chapter 13.36 RCW; *In re Guardianship of K.B.F.*, 175 Wn.App. 140, 148, 304 P.3d 909 (2013). The legislature found:

> that a guardianship is an **appropriate permanent** plan for a child who has been found to be dependent under chapter 13.34 RCW and who cannot safely be reunified with his or her parents. .....The legislature intends to create a separate guardianship chapter to establish **permanency** for children in foster care through the appointment of a guardian and dismissal of the dependency.

(Emphasis added).

Under RCW13.36.040(2) the Court shall grant a petition for a guardianship if:

(a) The court finds by a preponderance of the evidence that it is in the child's best interests to establish a guardianship, rather than to terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of the child to the parent; and

(b) All parties agree to entry of the guardianship order and the proposed guardian is qualified, appropriate, and capable of performing the duties of guardian under RCW 13.36.050; or

(c)(i) The child has been found to be a dependent child under RCW 13.34.030;

(ii) A dispositional order has been entered pursuant to RCW 13.34.130;

(iii) At the time of the hearing on the guardianship petition, the child has or will have been removed from the custody of the parent for at least six consecutive months following a finding of dependency under RCW 13.34.030;

(iv) The services ordered under RCW 13.34.130 and 13.34.136 have been offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided;

(v) There is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future; and

(vi) The proposed guardian has signed a statement acknowledging the guardian's rights and responsibilities toward the child and affirming the guardian's understanding and acceptance that the

> guardianship is a commitment to provide care for the child until the child reaches age eighteen.

RCW 13.36.040(2); *K.B.F.*, 175 Wn.App. at 148.

The father challenges finding of fact VIII and conclusions of law II,III, IV, that the Department proved that it is in J.B.' bests interests for parental rights to be terminated. CP 93-99.

The Legislature has unequivocally determined that guardianships are less restrictive, permanent solutions where children also benefit from having relationships with their families. RCW 13.36.010. The facts in support of finding of fact VIII and conclusion of law II, II, IV are not supported by sufficient evidence in the record.

b. Standard of Review.

This Court reviews the record to determine whether substantial evidence supports the findings, which in turn establish the statutory factors to support the guardianship by a preponderance of evidence. *In re Welfare of A.W.,* 182 Wn.2d 689, 701, 707, 709, 344 P.3d 1186 (2015). Under a guardianship, substantial evidence exists so long as a rational trier of fact could find the necessary facts were shown by a preponderance of the

evidence. Id. Unchallenged findings of fact are verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

c. Guardianship is in J.B.'s Best Interests.

Courts look to various factors to determine the best interest of the child, but ultimately the court must decide each case on its own facts and circumstances. *A.W.* 182 Wn2d at 711; *In re Welfare of A.C.*, 123 Wn.App. 244, 254, 98 P.3d 89 (2004). In *A.C.,* Division One considered these non-exclusive factors: the strength and nature of the parent and child bond, the benefit of continued contact with the parent or the extended family, the need for continued state involvement and services, and the likelihood that the child may be adopted if parental rights are terminated. *A.C.*, 123 Wn.App. at 255.

In considering these factors, the paramount concern is the child's rights to basic nurturing, physical health, and safety. *A.W.*, 181 Wn.2d at 712 (*citing In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Prior to the dependency in this case there were no concerns for J.B.'s basic nurturing, physical health, and safety.

The factors in *A.C.* do not support the trial court's finding that termination is in J.B.'s best interests in this case. First, J.B. has a very strong bond with his grandparents, but no information was presented regarding J.B.'s bond to his parents other than he freely goes to his parents during visits and his parents love him. RP 21, 175-76, 271. Second, J.B. lived with his parents and grandparents and cousins from birth to ten months old when he was removed and is bonded to them as his family. RP 367. Third, J.B. calls his grandparents Nana and Papa. RP 319, 411. Fourth, J.B. knows his cousins, who would all take good care of him. RP 328, 337. Fifth, there was no evidence presented to dispute the tremendous benefit to J.B. in being able to remain a member of his family - to benefit from their love, nurturing and support. *In re the Welfare of S.V.B.,* 75 Wn.App. 762, 775, 880 P.2d 80 (1994).

Sixth, there was no evidence the grandparents had any need for state assistance. The grandparents have four children and a grandchild living with them in good health. A.B. makes a good living and the family does not need financial or other assistance from the state. RP 323. Seventh, and finally, adoption is present in this case

to the extent that the Department testified that the current foster family wants to adopt J.B. and the Department wants J.B. to be adopted. RP 126. Ms. Sinnitt was not however able to guarantee that the adoption would not create issues for J.B. RP 149.

A trial court finding that the specific guardianship placement proposed would not be in a child's best interest, does not establish by a preponderance of evidence that guardianship is not in the child's best interests under RCW 13.36.040(2). *In re Welfare of A.W.,* 182 Wn.2d 689, 712-13, 344 P.3d 1186 (2015); *K.B.F.*, 175 Wn.App. at 146-147.

In this case, the evidence presented at trial did not support a finding that guardianship was not in J.B.'s best interest. Rather, the trial judge clearly did not like the grandparents based on her very aggressive cross examination of S.B., and her scathing findings of fact regarding S.B.'s credibility, how she keeps her home and her past history- even though remedied. RP 471-86; CP 93-99.

The trial court guaranteed that adoption would permanently deprive JB of his family. J.B. deserves to play in sandbox with his cousins while they do gymnastics, to know his grandparents and to

be surrounded by his family. A guardianship is in J.B.'s best interests and the trial court erred in finding that termination was in J.B.'s best interests.

d. The trial court's finding did not support denial of the guardianship petition.

"The trial court is not required to determine that the specific guardianship placement would be in a child's best interest. RCW 13.36.040(2). Instead, the statute requires a finding that a guardianship is in the child's best interest rather than adoption or continued reunification efforts with the parent." *A.W.*, 182 Wn.2d at 712-13.

Judge Forbes entered findings and conclusions of law that termination was J.B.'s best interests. CP 93-99. The focus of Judge Forbes' findings in support of this conclusion determined that it was not in J.B.'s best interests to have A.B. and S.B as his guardians, but the findings did not address the suitability of a guardianship in general. CP 93-99 This Court should not infer this finding either because the evidence does not support such an inference. *In re Welfare of A.B.,* 168 Wn.2d 908, 921-22, 234 P.3d 1014 (2010).

In *R.H.*, this Court implicitly held that when the case specific facts provide that a guardianship is available and in the best interests of the child, the guardianship should prevail over a termination as a more flexible and less restrictive alternative. *R.H.,* 176 Wn.App. at 426-429. The ruling was implicit because the central issue addressed in *R.H.*, was the trial court's failure to consider a guardianship, not a weighing of the evidence).

Here, the trial court's findings that termination is in J.B.'s best interest because A.B. and S.B are not suitable guardians does not satisfy the criteria for denial of a guardianship under RCW13.36.040(2) which requires the trial court to consider the suitability of a guardianship, not the suitability of the guardians. Id. Because the trial court did find that a guardianship was not in J.B. best interests, this Court should reverse the order of termination and remand for a guardianship, or fact finding to determine the appropriateness of a guardianship.

e. Court Should Have Considered Indian Heritage When Making Placement Decision.

The Indian Child Welfare Act (ICWA) is relevant in this case, if not legally required. Congress enacted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." 25 U.S.C. section 1902. Congress recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children." 25 U.S.C. section1901 (3), (4). Washington also adopted its own version of ICWA, ch. 13.38 RCW, which parallels the federal version in many aspects. *In re Adoption of T.A.W.*, 188 App. 799, 805-06.345P.3d 46 (2015).

Under ICWA state laws may offer broader protections than the ICWA, if these laws do not infringe on rights afforded by the ICWA. 44 Fed Reg. 67586. "Absent good cause, the department or supervising agency shall follow the wishes of the natural parent regarding the **placement** of the child in accordance with RCW 13.34.260." RCW 13.34.130(2) provides a preference that children

should be placed with relatives. RCW 13.34.138 provides that Indian children should be placed with family:

> (a) In the least restrictive setting;
>
> (b) Which most approximates a family situation;
>
> (c) Which is in reasonable proximity to the Indian child's home; and
>
> (d) In which the Indian child's special needs, if any, will be met.
>
> (2) In any foster care or preadoptive placement, a preference shall be given, in absence of good cause to the contrary, to the child's placement with one of the following:
>
> (a) A member of the child's extended family;
>
> (b) A foster home licensed, approved, or specified by the child's tribe;
>
> (c) An Indian foster home licensed or approved by an authorized non-Indian licensing authority;
>
> (d) A child foster care agency approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs;
>
> (e) A non-Indian child foster care agency approved by the child's tribe;
>
> (f) A non-Indian family that is committed to:

> (i) Promoting and allowing appropriate extended family visitation;
>
> (ii) Establishing, maintaining, and strengthening the child's relationship with his or her tribe or tribes; and
>
> (iii) Participating in the cultural and ceremonial events of the child's tribe.
>
> (3) In the absence of good cause to the contrary, any adoptive or other permanent placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:
>
> (a) Extended family members;
>
> (b) An Indian family of the same tribe as the child;
>
> (c) An Indian family that is of a similar culture to the child's tribe;
>
> (d) Another Indian family….

RCW 13.34.138. RCW 13.34.260 and .130(2) do not conflict with ICWA. These provisions support the ICWA preference for placing children with their families and following the parents' wishes.

In this case, LICWAC early on in the dependency supported J.B.'s placement with his Indian family. RP 371. The fact that J.B. is not enrollable in a tribe does not diminish his tribal heritage through

his grandmother and grandfather A.B. (Supp. CP___Letters to Tribes and Tribal Responses). J.B.'s Indian heritage is but an additional factor the trial court should have considered before rejecting A.B. as a guardian. The trial court's failure to consider the child's heritage along with the preference for family placement contravenes the purpose and intent of the legislature to keep families intact and Indian families together. Accordingly, this Court should reverse the order of termination and remand for a guardianship.

2. THE EVIDENCE AT THE TERMINATION TRIAL DID NOT ESTABLISH BY CLEAR, COGENT AND CONVINCING EVIDENCE THAT MAINTAINING THE PARENT CHILD RELATIONSHIP DIMINISHES THE CHILD'S ABILITY TO INTEGRATE INTO A PERMANENT HOME.

A termination proceeding is a civil proceeding. *In re Welfare of S.E.,* 63 Wn.App. 244, 249, 820 P.2d 47 (1991). It is well established that parents have a fundamental liberty and property interest in the care and custody of their children. U.S. CONST. amends. V, XIV; WASH. CONST. art. I, § 3; *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Stanley*

v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Welfare of M.S.R.*, 174 Wn.2d 1, 13, 271 P.3d 234 (2012). That right cannot be abridged without due process of law. U.S. CONST. amend. XIV. Thus, parental termination proceedings are accorded strict due process protections. *In re Welfare of L.R.*, 180 Wn.App. 717, 723-34, 324 P.3d 737 (2014).

RCW 13.34.180(1) and RCW 13.34.190, require our courts to use a two-step process when deciding whether to terminate the right of a parent to relate to his or her natural child. The first step focuses on the adequacy of the parents and must be proved by clear, cogent and convincing evidence. RCW 13.34.180(1); *A.B.*, 168 Wn.2d at 911; *In re Welfare of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999); Santosky,* 455 U.S. at 769: RCW 13.34.180(1). Evidence is clear, cogent and convincing "when the ultimate fact in issue is shown by the evidence to be 'highly probable.'" *In re Welfare of K.R.,* 128 Wn.2d 129, 141, 904 P.2d 1132 (1995) (quoting *Sego.,* 82 Wn.2d at 736).

a. <u>The State Failed to Prove that Continuation of the Child Parent Relationship Diminished J.B.'s</u>

Prospects for Integration into a Permanent and Stable Home.

Here the Department failed to prove by clear, cogent and convincing evidence that continuation of the parent and child relationship clearly diminished J.B.'s prospects for early integration into a stable and permanent home as required under RCW 13.34.180(1)(f).

In 2013, the Supreme Court in *In re Welfare of K.D.S.*, 176 Wn.2d 644, 658, 294 P.3d 695 (2013), explained that "RCW 13.34.180(1)(f) focuses on the parent-child relationship and whether it impedes the child's prospects for integration, not what constitutes a stable and permanent home." *R.H.*, 176 Wn.App at 428.

This Court explained the two ways the state could prove RCW 13.34.180(1)(f): (1) that "a permanent home exists but the parent-child relationship prevents the child from obtaining that placement"; and (2) that "the parent-child relationship has a damaging and destabilizing effect on the child that would negatively impact the child's integration into any permanent and stable

placement." *R.H.*, 176 Wn.App at 428.

The trial court in finding of fact VII parroted this language from *R.H.*, but the substantive evidence does not support the finding under either prong of the *R.H.* K.S.C., 137 Wn.2d at 925.

The finding consists primarily of the trial court's personal opinion regarding the credibility of the grandparents, the current state of cleanliness in their home according to the social worker not officer Mondry, and the judge's speculative opinion on the current welfare of the five children in the grandparents' home. CP 93-99. The evidence presented indicated that the five children were all thriving. RP 174.

The evidence presented indicated that the parents love J.B., and he goes to them freely. RP 21,175-76. These facts do not support a finding that the parent child relationship is damaging or destabilizing, or that the current foster home is not adequately permanent. J.B. has lived in his current foster home for one year and these people want to adopt him, but they have not refused to continue the foster placement until the court properly addresses the guardianship issue. 126, 205.

Finding of fact VII lambasts the grandparents for what the trial court personally speculated to be the facts, rather than relying on the actual facts, but the trial court's opinion are not relevant to RCW 13.34.180(f). CP 93-99. The trial court railed on about the "stunning" lack of credibility and the fact that the grandparents lied about a single DV incident, but contrary to the trial court's findings, lying about a DV incident does not make the grandparents irresponsible, truth avoidant or incapable of safely caring for J.B. It only establishes that they lied about this incident. Moreover, the speculation about the other children the home not thriving was not supported by any evidence in the record or relevant to prove RCW 13.34.180(1)(f).

The trial court found that S.B. blamed everyone else for past family issues, but the evidence does not support this finding either. S.B. freely admitted that her children were removed from her care and made dependents of the state until she successfully completed drug and alcohol assessment, domestic violence and anger management treatment, provided hundreds of clean UA's ,took parenting classes, and successfully satisfied the trial courts in 2009

and 2011 that she could safely parent her children. CP 450-456. The dependencies were dismissed and the children appear to be thriving. RP 136, 239, 456. These facts or speculations or personal opinions of the trial court do not support finding of fact VII.

Finding of fact VII demonstrates the trial court's determination not to place J.B. with her grandparents. However, parental rights cannot be terminated simply because a better home may be available elsewhere. *In re Welfare of Mosely,* 34 Wn. App. 179, 186, 660 P.2d 315, *review denied*, 99 Wn.2d 1018 (1983). Our legislature's focus on keeping families intact necessarily means that a guardianship with family cannot be denied because a better home may be available elsewhere. RCW 13.34.020.

Where the continuation of the parent-child relationship does not interfere with the child's integration into a permanent home because termination of parental rights would have no impact on a child's living arrangement, RCW 13.34.180(1)(f) has not been proved. *See S.V.B.,* 75 Wn.App. at 775.

In *S.V.B.,* this Court held that it was error to terminate the father's parental rights where his child was living with the paternal

grandmother pursuant to a court-established guardianship, and that arrangement would not change if the father were to lose his parental rights. *S.V.B.*, 75 Wn.App. at 775. This court observed that termination of a parent's rights despite the availability of a permanent home elsewhere "deprive[s] [the child] of the benefits of a parent—the potential for nurturing support and the financial support that the law would otherwise obligate [the parent] to provide." *S.V.B.,* 75 Wn.App. at 775.

Here although J.B. was not living with his grandparents at the time of the termination hearing, he had lived with them for half of his life. There was no evidence that continuing the parent child relationship would undermine the stability of J.B.'s current placement of a placement in a permanent guardianship with his grandparents. The similarity with *S.V. B.* and this case lies in the strength and power of the existing familial relationships. *S.V.B.*, 75 Wn.App. at 775. The fact that J.B. was in a dependency and *S.V.B.*, in a guardianship dependency does not alter the applicability of this Court's ruling that it is error to terminate the parent child relationship when the legal relationship does not

impede the child's integration into a permanent and stable home. Id.

Here there was no evidence that terminating parental rights was necessary to achieve permanency for J.B. Rather, contrary to *S.V.B.*, termination would only serve to deprive J.B. of the benefits of his parent's love and financial support.

3. THE STATE DID NOT PROVE THAT TERMINATION OF THE PARENT-CHILD RELATIONSHIP WAS IN THE CHILD'S BEST INTEREST.

Only after the requirements of RCW 13.34.180 are satisfied may the court consider if termination of the parent-child relationship is in the child's best interest. RCW 13.34.190(2); *A.B.*, 168 Wn.2d at 925; *In re Welfare of Churape*, 43 Wn. App. 634, 719 P.2d 127 (1986). It is "premature" for the trial court to address the child's best interests before first establishing the criteria set forth in RCW13.34.180. *A.B.*, 168 Wn.2d at 925.

The Supreme Court in *A.B.*, reversed the order of termination and remanded for transfer of the child to her father's custody where the trial court erroneously focused on the best

interests of the child when the state had not proved that the father was currently unfit under RCW 13.34.180.

Here, J.B. was well cared for in his parent's custody while living with his grandparents. There was no evidence that termination would do anything but harm J.B. who has a strong bond with his nana and papa. The evidence does not support finding of fact VIII and conclusions of law II, III, IV.

Under *A.B.;* RCW 13.34.180; and RCW 13.34.190 the trial court erroneously considered J.B.'s best interest before requiring the Department to prove RCW 13.34.180(1)(f). This was error which requires this Court remand for reversal of the order of termination and vacation of the findings and conclusions.

4. THE TRIAL COURT VIOLATED THE SEPARATION OF POWERS AND EXCEEDED ITS AUTHORITY BY INVESTIGATING THE GUARDIANS WITH INFORMATION NOT PROVIDED BY THE PARTIES.

Washington courts derive their judicial power from article IV of the state constitution and from the legislature under RCW 2.04.190. *Spratt v. Toft*, 180 Wn.App. 620, 635, 324 P.3d 707

(2014). The separation of powers doctrine is "one of the cardinal and fundamental principles of the American constitutional system" and forms the basis of our state government. *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012).

Under Washington's constitution, the judiciary is separate from legislative and executive branches. Id. "Each branch of government wields only the power it is given." *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The constitutional division of governmental power is "for the protection of individuals" against centralized authority and abuses of power. *Rice,* 179 Wn.2d at 901. Issues of constitutional and statutory interpretation are questions of law, reviewed de novo. *Rice,* 179 Wn.2d at 890.

The trial court *sua sponte* investigated the proposed guardians without constitutional or statutory authority by using the Judicial Information System (JIS) to investigate the grandparent's court histories, when such evidence had not been presented by the parties. RP 421-34. The judge used the information obtained from the JIS to craft an aggressive cross examination designed to impeach the grandparents. RP 471-86.

The trial court referenced H.B. 1617 and asserted that under that bill, she was authorized to investigate the grandparents using the JIS. Id. H.B. 1617, codified as RCW 2.28.210 was not in effect at the time of the June 2015 fact finding hearing. Id. The effective date for RCW 2.28.210, was July 24, 2015, some six weeks after the fact finding. Id. Accordingly, the trial court's investigation into matters not in the record violated the separation of powers which denied the father his due process righto a fair and impartial trial because there was no opportunity to vet the basis for anything listed on the JIS docket. The order of termination should be reversed and the matter remanded for a new fact finding with a different judge.[2]

5. THE TRIAL COURT VIOLATED THE FATHER'S DUE PROESS RIGHT TO A FAIR AND IMPARTIAL HEARING AND THE APPEARANCE OF FAIRNESS

[2] Although not necessarily ripe for review in this case because it was not in effect at the time of the fact finding, RCW 2.28.210 may not be constitutional because it permits a judge to review information has not been vetted through cross examination but rather provides a conclusion without a context. Such information invariably will prejudice the parties against which it is used. *See also*, *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012) (RCW 10.58.090 is an unconstitutional violation of separation of powers because it irreconcilably conflicts with ER 404(b) regarding a procedural matter involving the admission of evidence).

DOCTRINE.

As stated *supra*, the Constitution guaranteed the father his right to a fair fact finding hearing. U.S. CONST. amends. V, XIV; WASH. CONST. art. I, § 3; *Santosky,* 455 U.S. AT 753. That right cannot be abridged without strict adherence to due process of law. U.S. CONST. amend. XIV.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. *State v. Gamble,* 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citing *State v. Bilal,* 77 Wn.App. 720, 722, 893 P.2d 674 (1995) " 'The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.' " *State v. Post,* 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (*quoting State v. Madry,* 8 Wn.App. 61, 70, 504 P.2d 1156 (1972)).

"The CJC [Code of Judicial Conduct] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Tatham v. Rogers,* 170 Wn.App. at 95 (*quoting*

Sherman v. State, 128 Wn.2d 164, 205, 905 P.2d 355 (1995)).

The test for determining whether the judge's impartiality might reasonably be questioned is an objective one reviewed de novo. *Tatham,* 170 Wn.App. at 87; *State v. Leon,* 133 Wn.App. 810, 812, 138 P.3d 159 (2006), *review denied,*159 Wn.2d 1022, 157 P.3d 404 (2007). To determine if a judge is impartial, the defendant must provide evidence of bias. *Dominguez*, 81 Wn. App. at 330; *See also*, Post**,** 118 Wn.2d at 619; *Leon,* 133 Wn. App. at 812.

Examples of bias that violate the appearance of fairness doctrine include a trial judge who becomes involved in the investigation of a case, where the hotel where the crime was committed was owned by another judge, and the trial judge had joined in a letter to the hotel owner, requesting that he remedy the problem, because it reflected poorly on the judiciary. *Madry,* 8 Wn.App. at 70.

In *Madry*, the reviewing court determined that the judge had a personal interest in the defendant's business because of his investigation, which could lead a reasonable person to question the judge's impartiality which created a violation of the appearance of

fairness doctrine. *Madry,*8 Wn.App. at 70.

In *Sherman,* the Supreme Court found a violation of the appearance of fairness doctrine where the trial engaged in prohibited ex parte contact that could have " inadvertently" provided the judge "information critical to a central issue on remand," sufficient to cause a reasonable person to question the judge's impartiality. *Sherman,* 128 Wn. 2d at 20.

In *State v. Romano,* 34 Wn.App. 567, 662 P.2d 406 (1983), this Court reversed even though there was no evidence that the sentencing judge misused his own ex parte investigation of the facts to confirm the defendant's statements about his business. This Court nonetheless concluded that the ex parte investigation "inescapabl[]y" "clouded the proceeding". *Romano,* 34 Wn.App. at 569.

In the case of *State v. Ra,* the Court of Appeals found the trial court's improper comments during sentencing (along with comments that had occurred at trial) violated the defendant's right to Due Process and the appearance of fairness. *State v. Ra*, 144 Wn. App. 688, 704-05, 175 P.3d 609 (2008), *review denied*, 164 Wn.2d 1016 (2008).

> We agree with Ra that the trial court's comments suggesting that Ra was "some distorted character who breeds and lives violently," RP at 829, and scolding him for apparently nodding "as if you are agreeing with me," RP at 847, were inappropriate, "[did] not show proper restraint[,] and should not have been made." *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

State v. Ra, 144 Wn. App. at 705.

In this case, the trial court showed the same bias or at least the appearance of bias by attacking S.B. and A.B.'s character far beyond the evidence in the form of her expressed opinion that A.B. and S.B. were stunning liars who were incapable of caring for J.B. The trial court revealed that notwithstanding any lack of evidence in support of termination or support for guardianship, she was not going to rule in favor of a guardianship.

The trial court's language in her findings was unnecessarily harsh and exhibited her personal animosity towards the grandparents. The judge's cross examination was also unnecessarily aggressive. While, it was not apparent that the judge's bias was based on race or gender, her bias was evident.

Alternatively, the judge appeared biased similar to *Sherman,*

Ra and *Romano.* Here, while the judge did not engage in ex parte contact she did conduct her own investigation which she used to deny the guardianship. CP 93-99. The trial court's denial of the guardianship was laden with personal animosity towards the grandparents which cast irreversible doubt on the appearance of fairness, regardless of whether or not the trial court was in fact biased.

The judge's ruling raises real questions about the judge's impartiality. Certainly, it is more than the required "some evidence" in which the trial judge's impartiality "might reasonably be questioned." *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007).The trial court's unsupported accusations and conclusions along with her aggressive cross–examination violates the appearance of fairness. Accordingly, the order of termination must be reversed and the case remanded for a new fact finding trial in front of a different judge because the father has provided the necessary quantum of evidence under the standard of review, requiring the a parent to demonstrate some "potential "evidence that "might" or create an appearance of unfairness. *Gamble,* 168 Wn.2d

at 187–88; *Chamberlin,* 161 Wn.2d at 37.

D. CONCLUSION

Under RCW 13.34.180, prior to terminating the parent-child relationship, the state is required to meet all of the criteria set forth therein. Once those criteria are satisfied, the state must also prove that termination is in the child's best interest under RCW 13.34.190. Here the state failed to prove RCW 13.34.180(1)(f), that continuation of the parent child relationship prevented early integration into a permanent and stable home; and improperly considered J.B.'s best interests before satisfying the criteria in RCW 13.34.190. The trial court also erred by denying the guardianship because the father presented evidence by a preponderance of evidence that a guardianship was in J.B.'s best interests rather than termination.

The father was also denied his due process right to a fair trial by the trial court violating the separation of powers and the appearance of fairness doctrine. The Department did not prove that termination was in J.B.'s best interests. For these reasons, this Court must revers the order of termination and remand for a

guardianship or a new guardianship hearing.

DATED this 31st day of January 2016

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Office of Attorney General PeterK@atg.wa.gov and J.B., a true copy of the document to which this certificate is affixed, on January 19, 2016. Service was made electronically to the AAG and via U.S. Mail to J.B. 351 E. Rivendell, Grapeview, WA 98546.

Signature

ELLNER LAW OFFICE

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